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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMIE D. LUNCEFORD,

Defendant and Appellant.

B211248

(Los Angeles County
Super. Ct. No. YA068935)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sandra Thompson, Judge. Affirmed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Jimmie D. Lunceford was convicted of one count of assault on a police dog, inflicting serious injury, in violation of Penal Code section 600, subdivision (a) (section 600(a)).¹ He was also convicted of three counts of criminal threats and one count of attempted first degree burglary. He was sentenced to a total of five years eight months in prison. He contends that the trial court had a sua sponte duty to instruct on legal justification as to the section 600(a) count. We find that on the facts of this case, no such duty existed. We therefore affirm.

FACTS

1. Prosecution Evidence

On July 23 or July 24, 2007, Suzanne B. ended her seven-year romance with appellant, stopped living in his home, and moved to the home of her adult daughter Annette and Annette's four small children.² A temporary restraining order was soon needed due to the problems appellant created when he showed up at Annette's house. Suzanne had another adult daughter who went by the name of Claudia and who lived elsewhere. Appellant was furious with Annette and Claudia because he believed they influenced Suzanne to leave him. Between July 27 and the early morning hours of July 30, he left approximately 40 threatening messages on Annette's and Claudia's telephones. The jury heard the recorded calls at the trial. Using extremely foul language, appellant threatened to kill Claudia, Annette and Annette's children if Suzanne did not come back to him. He also asked Annette and Suzanne to call the police so that the police would come and shoot him.

On the afternoon of July 29, appellant stood outside of Annette's home, shouting obscenities. Annette dialed 911 and ran outside. As appellant left, he threatened to "blow [Claudia] away." When police officers arrived, Annette had them listen to the phone messages appellant had been leaving. Appellant telephoned Annette while the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² All subsequent events occurred in 2007.

officers were there. Annette placed the call on her speaker phone. Appellant stated that Annette and her children were dead. The officers helped Annette to obtain an emergency protective order. When the officers went to appellant's home to serve the order, they did not find appellant, but they found several rounds of ammunition scattered on the front porch and steps.

Appellant continued to make threatening calls to Annette during the rest of July 29 and the early morning hours of July 30. In his final call, he said he was going to go to Annette's house, bust the door down, and cut her into ribbons. He showed up outside her house around 4:30 a.m., calling for Suzanne. Annette, her children, and Suzanne were together in the living room with the windows closed and the doors locked. Annette ordered appellant to leave, dialed 911, and stayed on the phone with the 911 operator. Appellant banged on a window, tried to open the back door, and pushed against the front door. He was yelling loudly. One of his statements was, "I'm not going to go away this time, I don't care, they're going to have to kill me." Finally, he drove away. Annette told the 911 operator about his behavior and described his vehicle.

Police Officer Felix was a few blocks away, responding to Annette's 911 call, when she saw appellant driving his truck. Felix had been told that appellant was harassing his ex-girlfriend and wanted to die in a "suicide by cop type situation." She activated her lights and siren. Appellant drove slowly back to Annette's house and stopped in the driveway. Felix followed him. She was soon joined by three other officers, Nimmons, Sapien and Greenleaf. She got out of her car and pointed her handgun at appellant, who was about 32 feet away. She told him to throw his keys out the window and display his hands. He threw out his keys but did not show his hands. He stayed inside his truck while repeating, "Just shoot me, I want to die, and I have a knife."

Officer Nimmons had a Taser weapon, and Officer Sapien had a bean bag shotgun, but appellant was out of range for those options.

After several minutes, appellant got out of his truck with his right hand clenched in a fist. Officer Felix could not see appellant's left hand, which was still inside the

truck. Appellant kept yelling that he had a knife and wanted to be shot. Felix could not see a knife.

Officer Greenleaf was the senior officer at the scene, so he was responsible for deciding what to do. His trained police dog Valor was in his car. He heard appellant yelling that he wanted to be shot. He knew that bullets had been found at appellant's house. He was about 75 feet from appellant and saw nothing in appellant's hands, but he thought appellant might have a weapon in the truck. He did not want anyone to be shot. He decided to use Valor. He got Valor out of his car and ordered the dog to pull appellant to the ground.

Valor ran straight toward appellant. Officer Felix then saw that appellant held a knife. Valor stood on two feet and jumped into appellant's midsection. Appellant pushed the dog away, but it came back at him. Using his clenched right hand, appellant made two "stabbing motions" at Valor's neck, under the chin. Officer Greenleaf then realized that appellant had a knife. Greenleaf ran toward Valor and told the dog to stop. Valor obeyed. Appellant followed orders to drop the knife, put his hands in the air, and lie down. He was handcuffed and placed in a patrol car. He continued to ask that he be shot.

Later that morning, Officer Felix saw that appellant wore a white plastic hospital bracelet. Appellant told Felix that he had been voluntarily hospitalized for a psychiatric evaluation and had been released against his will, as he still felt suicidal. Felix made a request for another such evaluation.

Valor had two puncture wounds in the neck, each of which was an inch and a half long. Stitches were necessary, followed by two weeks of recovery. Appellant had no bite wounds on his hands and arms. He told Officer Greenleaf that he lacked strength in his right hand, due to an accident. He later wrote an apology for hurting Valor.

2. Defense Evidence

Appellant testified that Suzanne stopped living with him on July 25 because of his suicide attempts. After she left, all he could think about was killing himself. He made the calls to Annette so that the police would come and shoot him. He did not want to hurt

anyone but himself and did not intend to scare or threaten anyone. Before he went to Annette's home on July 29, he had been in a psychiatric hospital for 20 hours following a suicide attempt. The doctors released him against his will. He went to Annette's house and asked Suzanne to leave with him, but she refused. He left and continued to think about killing himself. He did not have a gun, but he had some bullets. He scattered the bullets onto his front porch in the hope the police would see them and shoot him.

Appellant further testified that he returned to Annette's house in the early morning hours on July 30, knocked on the door, and asked for Suzanne. Annette told him she was going to call the police. He told her he wanted her to do that, and she would see a dead man in her driveway. He got back into his truck and drove off. He saw the police, drove back to Annette's house, and pulled into the driveway, because he wanted the people inside the house to see him die and feel guilty. He sat in his truck, preparing to die. He heard Officer Felix's commands. He threw out his keys but kept his hands and body in the truck. He yelled that he wanted the officers to shoot him and wanted to die. When he got out of the truck he was holding a big knife in his hand. He used the knife as a prop that would cause the officers to shoot him. As soon as he got out of his truck, Valor was in front of him. He pushed Valor away to defend himself from being bitten, and he cut Valor because he was holding the knife, but he did not stab Valor.

DISCUSSION

Appellant contends that the trial court should have instructed on the definition of legal justification in connection with count 5, the section 600(a) allegation involving Valor, the police dog.

Section 600(a) states, in pertinent part: "Any person who willfully and maliciously and with no legal justification strikes, . . . cuts [or] stabs . . . any dog under the supervision of, any peace officer in the discharge or attempted discharge of his or her duties, is guilty of a public offense." The offense is punishable as a felony "[i]f the injury inflicted is a serious injury." (*Ibid.*)

The trial court has a sua sponte duty to instruct on a defense if it appears that the defendant is relying on the defense, or if there is substantial evidence to support the

defense and it is not inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

We recognized in *People v. Lee* (2005) 131 Cal.App.4th 1413, 1427, that the defense of self-defense can apply to an attack by a dog. That principle does not mean, as appellant argues, that the trial court here was required to "define legal justification, including instructions on reasonable force and the right to defend against unreasonable force."

According to appellant, "the main theory of the defense was that appellant acted in self-defense to prevent being attacked by Valor." Actually, however, appellant denied stabbing the dog, and said he accidentally injured it when he pushed it away while holding the knife. His counsel argued to the jury that Valor was injured because he jumped at appellant while appellant was holding the knife, and the fact the two stab wounds were not deep showed that appellant did nothing more than push Valor off. As the defense theory was an accidental wounding, it would have been inconsistent to ask the jury to decide whether appellant stabbed Valor in self-defense. Therefore, there was no sua sponte duty to instruct on self-defense under *People v. Breverman, supra*, 19 Cal.4th at page 157.

Moreover, appellant's reliance on *People v. Adams* (2004) 124 Cal.App.4th 1486 (*Adams*) is misplaced. *Adams*, like the case at bench, involved a conviction for violating section 600(a). The police officers testified that, while the defendant was hiding in a crawl space to avoid arrest, he used a stick to strike a police dog that was biting his leg. The defendant testified that he never struck the dog and the officers ordered it to attack him. On appeal, he contended that the trial court should have instructed sua sponte that self-defense against excessive force was "legal justification." *Adams* found it unnecessary to resolve that issue, as the jury necessarily resolved the issue of whether the officers used reasonable or excessive force based on the other instructions that were given. (*Adams*, at pp. 1494-1495.)

Here, as in *Adams*, the jury was instructed that a section 600(a) offense required harming of the dog "without legal justification," and the instruction did not define the

term “legal justification.” The difference here is that appellant had no possible legal justification for stabbing Valor. The officers were attempting to arrest him. He refused to show his hands, he yelled that he wanted the officers to shoot him, and *he said he had a knife*. Live ammunition had been found on his front porch, so there was a risk that he also had a gun. He was clearly the aggressor, so he was not entitled to claim self-defense. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 215; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, p. 409.) He had no more right to stab Valor than he would have had to stab the officers. We therefore conclude that the trial court did not need to define the term “legal justification.”

DISPOSITION

The judgment is affirmed.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.